**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LOURDES M. ROBERTS** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | Docket Nos. 1,023,937 & |
| | ) | 1,028,651 |
| **U.S.D. #229** | ) | |
| Self-Insured Respondent | ) | |

# ORDER

## STATEMENT OF THE CASE

Claimant requested review of the April 3, 2007, Award by Administrative Law Judge Robert H. Foerschler.[1] The Board heard oral argument on August 14, 2007. C. Albert Herdoiza, of Kansas City, Kansas, appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) consolidated these two docketed claims for trial but seemingly only entered an Award in Docket No. 1,023,937. During oral argument to the Board, the parties stipulated that the ALJ's Award was for both docketed claims, and the omission of Docket No. 1,028,651 from the caption was merely an oversight. The ALJ found claimant sustained a 10 percent permanent partial impairment to her left shoulder but no permanent impairment to her low back resulting from her work-related accident of February 5, 2005. He left open claimant's ability to apply for future medical treatment for her left shoulder. The ALJ also stated: "While Dr. Egea did render an opinion concerning [claimant's] current impairment, it would seem in the respondent's interest to pay his $200.00 fee as part of the Unauthorized Medical Expenses Allowance [K.S.A. 44-510h(b)(2)]. Otherwise it is reserved."[2] During oral argument to the Board, the parties agreed that this language should be treated as a denial of the requested medical expense.

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties stipulated that these claims were

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[1] The ALJ's Award bears only Docket No. 1,023,937, but claimant's Application for Review by the Workers Compensation Board bears both Docket Nos. 1,023,937 and 1,028,651. During oral argument to the Board, the parties agreed that these two docketed claims were consolidated for trial and award.

[2] ALJ Award (Apr. 3, 2007) at 10.

consolidated for trial and award. Although the ALJ listed the December 14, 2006, transcript of the deposition taken of Dr. Fernando Egea, whether the record includes the deposition testimony of Dr. Egea is an issue for the Board's review.

## ISSUES

Claimant requests review of the ALJ's findings concerning the nature and extent of her disability. Claimant argues she is entitled to an additional permanent partial disability award for permanent impairment to her low back based upon the opinions of Dr. Prostic and Dr. Egea. Claimant further argues she is entitled to an award for respondent to pay the remaining $200 in unauthorized medical to Dr. Egea, as well as future medical treatment for her shoulder and low back.

Respondent contends claimant did not suffer any permanent impairment to her low back and left shoulder from the February 5, 2005, accident, based upon Dr. Eden Wheeler's opinion. Respondent argues claimant did not have "good cause" to reopen the record for Dr. Egea's testimony. Respondent further argues claimant, in an attempt to manipulate K.S.A. 44-510h(b)(2), specifically asked an independent medical examiner to refrain from providing an impairment rating. Therefore, Dr. Egea's bill should not be ordered paid under the unauthorized medical expense allowance. In the alternative, respondent requests that the Board affirm the ALJ's Award.

The issues for the Board are:

(1) Did the ALJ err when he extended the parties' terminal dates to allow claimant to take the deposition of Dr. Egea? Should the Board consider the deposition testimony of Dr. Egea taken by claimant or Dr. Egea's records custodian's deposition taken by respondent? Should claimant pay the reporter fee and costs for the deposition of Dr. Egea?

(2) Did claimant suffer additional permanent impairment to either her low back or left shoulder as a result of the work-related accident?

(3) Is claimant entitled to an award for future medical treatment for her left index finger, left shoulder or back?

(4) Is claimant entitled to $200 in unauthorized medical expense for the cost of the examination by Dr. Egea?

## ISSUE NO. 1

Did the ALJ err when he extended the parties' terminal dates to allow claimant to take the deposition of Dr. Egea? Should the Board consider the deposition testimony of Dr. Egea taken by claimant or Dr. Egea's records custodian's deposition taken by respondent? Should claimant pay the reporter fee and costs for the deposition of Dr. Egea?

### FINDINGS OF FACT

On November 27, 2006, a hearing was held on claimant's Motion to Quash filed November 14, 2006, and the Motion to Quash and Motion to Extend Terminal Dates, which was filed on November 20, 2006. Claimant's attorney argued that respondent's counsel had scheduled the deposition of Dr. Egea's clerk to obtain medical records without clearing the date with his office. Claimant's attorney told respondent's attorney he planned to review the records with claimant and see what their position would be. After meeting with claimant, claimant's attorney decided to take the deposition of Dr. Egea to get the records in. Respondent's attorney again scheduled the deposition of Dr. Egea's clerk without clearing it with claimant's attorney's office. When claimant's attorney called respondent's attorney, he was told respondent wanted to proceed with the deposition of the clerk because its terminal date was going to expire. Claimant's attorney told respondent's attorney he had no problem with extending the terminal date to allow an opportunity to argue the Motion to Quash. Respondent's attorney indicated he would not agree to that. After subsequent conversations with respondent's attorney, it was claimant's attorney's impression that respondent was cancelling the deposition and that the terminal date could be extended to have the Motion to Quash heard before the ALJ before the deposition of the clerk would be taken. Respondent's attorney, however, showed up at Dr. Egea's office on the date of the scheduled deposition and obtained the deposition and offered the records as an exhibit. Claimant's attorney requested an extension of her terminal date for the opportunity to take Dr. Egea's deposition in order to clarify the records.

Respondent's attorney argued that because claimant's terminal date was September 11, 2006, and claimant had not sought an extension of her terminal date to take the deposition of Dr. Egea before her terminal date, she was barred from obtaining an extension absent respondent's consent. Respondent's terminal date was October 11, 2006, and with the terminal date approaching, respondent's attorney set Dr. Egea's clerk's deposition to occur on that date. He admits not coordinating the date with claimant's attorney, but he was running out of time and needed to get the records into evidence. Claimant's attorney told him he could not be available for an October 11 deposition, so the parties agreed to extend respondent's terminal date to November 15. Claimant's attorney was to examine the records and possibly stipulate them into evidence. Claimant's attorney did not contact respondent's attorney advising he was not going to stipulate the records

into evidence or that he wanted to take the deposition of Dr. Egea. Respondent's attorney called claimant's attorney's office a couple of times in October and November and on November 6, 2006, due to lack of response and the impending terminal date, scheduled the deposition of Dr. Egea's clerk for November 14, 2006. Again, he did not coordinate the date with claimant's attorney.

At the November 27, 2006, hearing on claimant's Motion to Quash and Motion to Extend Terminal Dates, respondent's attorney argued that it was improper to reopen the record to extend claimant's terminal date for a deposition of Dr. Egea because terminal dates can be extended only for good cause and only where the request is made before the expiration of a party's terminal date. Respondent's attorney contended he provided timely notice for the deposition of Dr. Egea's clerk, and, therefore, claimant's Motion to Quash should fail.

Claimant's attorney said Dr. Egea's records should have been introduced by taking the deposition of Dr. Egea so that he could be questioned about them and about how his prior treatment related to the injuries being alleged in this case. Claimant also objects to the notice of deposition given to claimant by respondent for the records custodian's deposition.

At the conclusion of the November 27, 2006, hearing, the ALJ gave both parties until the end of the year to get everything submitted. When respondent's attorney asked what the good cause was, the ALJ stated, "Because nothing is submitted yet."[3]

## PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-523 states in part:

> (a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.
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> (b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be

[3] Motion Hearing (Nov. 27, 2006) at 16.

> granted if all parties agree. An extension of the foregoing time limits may also be granted:
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> (1) If the employee is being paid temporary or permanent total disability compensation;
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> (2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment
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> (3) on application for good cause shown.

In *Box*,[4] the Kansas Supreme Court stated: "The admissibility of evidence is more liberal in compensation cases, not more restrictive."

In *Shehane*,[5] the Kansas Court of Appeals stated that "the ALJ and the Board are not bound by technical rules of procedure and are to give the parties a reasonable opportunity to be heard and present evidence."

> Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony which contradicts the witnesses on the opposite side, but also corroborates previous testimony. The use and extent of rebuttal rests in the sound discretion of the trial court and its ruling will not be reversed unless it appears the discretion has been abused to a party's prejudice.[6]

In *Bushey*,[7] the Kansas Supreme Court stated that "any procedure which is appropriate and not prohibited by the workmen's compensation act may be employed."

## ANALYSIS AND CONCLUSION

Respondent acknowledges that its purpose for taking the deposition of Dr. Egea's clerk was to show that claimant's injuries preexisted her February 5, 2005, accident and

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[4] *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 243-44, 689 P.2d 871 (1984).

[5] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 264, 3 P.3d 551 (2000).

[6] *State v. Richard*, 235 Kan. 355, Syl. ¶ 1, 681 P.2d 612 (1984).

[7] *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 125, 515 P.2d 735 (1973); see also *Crawford v. Wolf Creek Nuclear Operating Corp.*, No. 91,220 (unpublished Court of Appeals opinion filed July 2, 2004).

to impeach claimant's credibility by showing that she received more treatments from and reported more symptoms to Dr. Egea than what she testified to at the regular hearing. Respondent's taking the records deposition of Dr. Egea's clerk opened the door for claimant to take the deposition testimony of Dr. Egea to explain and rebut the implications respondent would put on Dr. Egea's records. Before respondent took the deposition of Dr. Egea's clerk, there was nothing for claimant to rebut. Obviously, claimant could not have filed a motion to extend her terminal date before the expiration of her terminal date where the purpose of the extension is for taking rebuttal testimony. As is generally the case in workers compensation litigation, claimant's terminal dates expired before respondent presented all of its witnesses' testimony and exhibits. Claimant made a timely request for an extension of her terminal date, which was even before the ALJ ruled on her motion to quash respondent's notice to take the deposition of Dr. Egea's records custodian. Rather than quash that deposition, which by the time of the hearing had already been taken, the ALJ allowed claimant to depose Dr. Egea. Most often, it is better to err on the side of allowing the admission of evidence rather than on the side of restricting it. And Dr. Egea's opinions were clearly relevant to the issues being presented to the ALJ for his determination. Whether described as rebuttal evidence or as good cause, under the circumstances, the ALJ was correct to reopen the record and extend terminal dates. The deposition of Dr. Egea's records custodian, Terri Brown, is admitted. The deposition of Dr. Egea is admitted. The costs of those depositions will be assessed to respondent and its insurance carrier.

## ISSUE NO. 2

Did claimant suffer additional permanent impairment to either her low back or left shoulder as a result of the work-related accident?

### FINDINGS OF FACT

Claimant works as a custodian at Blue Valley North High School, one of the schools in respondent's district. She had a previous work-related injury in 1997 in which she injured her low back while also working for respondent. Her injury was in the area of her low back, a little lower than her belt line and in the area of her hips.

Dr. F. Daniel Koch, a board certified orthopedic surgeon who works mainly with spinal problems, treated claimant after her 1997 work-related accident. In November 1997, he performed a decompression and lumbar fusion with instrumentation and bone grafting on claimant. In May 1998, Dr. Koch gave claimant permanent restrictions of no lifting greater than 15 to 20 pounds, no repetitive stooping and bending, and no vacuuming. He saw claimant on March 25, 1999, at which time he found her at maximum medical improvement (MMI). He rated claimant as having a 20 percent total body impairment

based on the AMA *Guides*.[8] After claimant was released from treatment, she was transferred from an elementary school to Blue Valley North High School in order to accommodate her restriction of no vacuuming. There, she was able to perform her job, abiding by all her restrictions, except for the restriction against repetitive bending. Before her 1997 injury, claimant's job as a custodian at respondent consisted of cleaning, throwing away trash, dusting, vacuuming, mopping, lifting buckets of water, sweeping, and moving tables, chairs and desks. After claimant returned to work after her 1997 surgery, she no longer vacuumed or lifted tables, chairs, desks or heavy trash bags. Although she has a restriction against repetitive bending, she has to bend in order to do her job.

Claimant saw Dr. Prostic as a result of the 1997 injury, and he gave her a rating of 25 percent permanent partial impairment to the body as a whole. She settled her 1997 workers compensation case in July 1999 for a 17 percent impairment.

Claimant was involved in an automobile accident on December 17, 2002. Claimant testified that after the automobile accident, she was treated by Dr. Fernando Egea for the muscles in her neck and upper back in the area between her shoulder blades, shoulder and neck. She claims the car accident did not cause her to suffer any permanent problems with her body. Claimant testified she did not have any pain complaints specifically to her lower back after the car accident but that she was given pain medicine and physical therapy for her whole back. However, she claims her main complaints were in her neck and upper back. She was off work for two or three months after the automobile accident and then returned to work as a custodian.

Contrary to Dr. Egea's records, claimant does not remember complaining to Dr. Egea of severe pain in her head, neck and low back in December 2002. She said she had a CT scan to her low back in January 2003 to make sure her back was okay because of her prior surgery. She does not remember complaining to Dr. Egea on January 22, 2003, that she had pain radiating to her lower extremities. Nor does she remember complaining to Dr. Egea of pain in her low back and that she had difficulty with motion in her low back on January 27, 2003. She does not remember telling Dr. Egea in February 2003 that she wanted to be treated primarily in her low back and that her neck felt better. Likewise, she did not remember telling Dr. Egea on February 14, 2003, that the pain in her low back was very intense. She does not remember telling Dr. Egea in March 2003, after she returned to work, that work was painful for her.

Dr. Fernando Egea is board certified in neurology, psychiatry and electroencephalography. He first saw claimant on December 30, 2002. Claimant had suffered a neck injury and some head trauma in an automobile accident on December 17,

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[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

2002. She had pain in her neck, head and low back. She had soft tissue injuries to her cervical, thoracic and lower spine and trapezius supraspinatus muscles. He treated her conservatively.

Claimant was seen in Dr. Egea's clinic on approximately 36 occasions between December 30, 2002 and April 23, 2003. She received treatment for her upper back, shoulders, as well as the low back area. Dr. Egea said that if claimant testified she did not have any low back complaints from the car accident, that would be inaccurate based on his records. The majority of the treatment he provided to claimant after the automobile accident was to her low back.

Dr. Egea's April 23, 2003, note indicated that claimant's cervical area had improved quickly. The low back pain and discomfort took longer to improve, but the range of motion in the low back was good. She had a moderate amount of muscle spasm on the lumbar paraspinal muscles bilaterally. The range of motion in the neck and shoulder were doing well, as was the thoracic spine. Only maximum flexion elicited pain in the lower back. Straight leg raising was negative on both sides. At that time, Dr. Egea considered claimant to be at MMI and dismissed her from his care. He did not give her any permanent restrictions as a result of the automobile accident.

Although Dr. Egea did not rate claimant's disability after the 2002 accident, he would probably have given her a 5 percent permanent partial impairment because of her mild discomfort in the lumbar area with no radiculopathy. He did not say whether this rating was pursuant to the AMA *Guides*.

In the current cases, claimant was working on February 5, 2005, sweeping floors after a function that had taken place at the school that day. The lead custodian, Larry Bingham, was on a platform above claimant. He was attempting to give claimant a box of candy when he lost his balance and fell on top of her. Both of them landed on the floor. Claimant fell on her back, and the full weight of Mr. Bingham's body was on top of her. She felt pain in her low back where she had the previous surgery, as well as up about six inches higher towards the middle of her back. She also injured her left shoulder and had two fractures on the index finger of her left hand.

Claimant did not seek treatment until five days after the accident because she thought the pain would disappear. When she went to the doctor, her back was bruised and swollen. She complained of pain in the central area of her low back continuing over towards both her buttocks and hips. She also had pain up in the middle of her back. The pain in her middle back was new pain that claimant did not have before the 2005 injury. The doctors did not give her shoulder problems much attention, and she was told the fractures of her finger would heal in time.

Claimant stated that if she had suffered from these problems before the 2005 injury, she would have requested post-award medical treatment. She did not request additional treatment for the eight years after the 1997 injury before the 2005 injury. She claims she was doing well until the 2005 accident occurred.

Dr. Eden Wheeler, who is board certified in physical medicine and rehabilitation, examined claimant initially on July 21, 2005. Claimant had been referred to her by an orthopedic surgeon, Dr. Chris Wilson. She had been seen on May 25, 2006, by her partner Dr. Steven Hendler. Dr. Wheeler reviewed records of claimant's prior medical treatment with Dr. Wilson, OHS, Dr. Koch and Dr. Kimber Eubanks, as well as the CT scan and plain x-rays. Claimant told Dr. Wheeler she was having low back and hip pain after a supervisor fell on her. She had been treated conservatively by Dr. Wilson and had a series of three L3-4 epidural injections and bilateral pyriformis muscle injections by Dr. Eubanks, an anesthesiologist and pain management physician. She complained of continued stiffness and soreness in her low back, especially near her tailbone, which radiated into her hips. She described the pain as stabbing, shooting, and sharp. She also complained of neck and shoulder pain with onset in the 24 hours preceding the appointment. She stated she had chronic left arm pain and elbow tendinitis that she attributed to the fall. Claimant reported to Dr. Wheeler having an immediate onset of left upper extremity pain at the time of the accident and noticed a red, swollen left index finger the next day. On her pain diagram, she indicated pain in the mid back to the low back and the buttock, hips and thighs. Claimant also complained of right hand numbness that awakened her at night but said this preexisted her current injury.

Claimant told Dr. Wheeler about her work-related accident in 1997 and that she did not seek any medical care for her low back following her release after surgery until the current injury. She did not tell Dr. Wheeler about the automobile accident in 2002 or the fact that she had approximately five months of treatment after that accident.

Dr. Wheeler diagnosed claimant with low back pain. She said claimant's Waddell's test was positive at three out of five. Her range of motion was not significantly limited. She achieved up to 80 degrees on flexion and 15 degrees of extension, which is near normal. Her reflexes were normal for both upper and lower extremities. Claimant had diffuse tenderness to palpation in a large area as opposed to a more focused area of tenderness, which can be a sign of symptom magnification. Dr. Wheeler did not note any abnormalities in her examination of claimant's upper extremities. In light of the fact that claimant had already had epidural injections with no benefit and had not been recommended for surgery, Dr. Wheeler only had conservative treatment options to offer. She recommended an alternate therapy facility that would focus on education and function and a TENS unit. She also placed claimant back on her prior 20-pound lifting and other restrictions that she had before this injury and continued her medications.

Dr. Wheeler again saw claimant on August 18, 2005. Claimant reported some improvement but stated her pain was a 5 out of 10. Upon examination, Dr. Wheeler found her lumbar range of motion was normal. Her gait and lower extremity range of motion and strength were also normal. However, she continued to have diffuse tenderness in the similar distribution as on her initial examination. However, Dr. Wheeler acknowledged that she did not use an inclinometer at any time to measure claimant's range of motion as is required by the AMA *Guides*. Dr. Wheeler recommended claimant continue therapy for another three weeks, continued her permanent restrictions, and asked her to increase the frequency of the use of the TENS unit.

Dr. Wheeler saw claimant again on September 7, 2005. Claimant related she had no change in symptoms since her last visit. She was having pain in her low back, buttocks and the anterior thighs. Physical therapy had been discontinued. Waddell's signs were still inappropriate. Dr. Wheeler opined that claimant, despite having pain, had reached MMI and released her on that date. She recommended claimant retain her prior restrictions from Dr Koch, continue her medications and continue using the TENS unit. Using the AMA *Guides*, Dr. Wheeler opined that claimant had a 20 percent permanent partial impairment for her low back in the past and found no additional impairment from her 2005 vocational injury. She did not feel claimant's 2005 accident resulted in any increased permanent impairment because her range of motion was normal, she had a preexisting history of surgery as well as degenerative changes on her CAT scan, she had a normal neurological examination, and her permanent restrictions were unchanged. Claimant's only real change was her subjective complaints of pain. Dr. Wheeler likewise did not assess claimant any permanent partial impairment for her shoulder because the only complaint claimant made about her shoulder was at the initial consultation.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at the request of her attorney on October 12, 2005. He had previously seen her on June 11, 1997 and July 31, 1998, in regard to her 1997 work-related injury. Claimant told Dr. Prostic that she had made a good recovery from her 1997 low back injury and surgery.

On October 12, 2005, claimant gave Dr. Prostic a history of her work accident of February 2005 when a coworker fell on top of her. Claimant was sent to Dr. Chris Wilson, who recommended epidural injections, which were provided by Dr. Kimber Eubanks. Claimant was then transferred to Dr. Wheeler, where she had additional medicine, physical therapy and a TENS unit.

Claimant complained of a constant ache in the center of her low back below the waist with radiation into her posterior hips. She had soreness when she awoke. She got worse with sitting, standing, walking, bending, squatting, twisting, lifting, pushing, pulling, coughing and inclement weather. She had frequent tiredness in her legs. She had an ache at her left index finger with clicking and popping and, at times, numbness. She has intermittent mild symptoms at the left shoulder.

Upon examination of claimant's left shoulder, Dr. Prostic found claimant's left arm had a circumference one-half inch less than the dominant right. She had tenderness anteriorly of the shoulder. She had mild crepitus with motion of the shoulder. There was mild weakness of flexion and abduction and moderate weakness of external rotation of the shoulder. Upon examination of claimant's lumbar spine, Dr. Prostic found that in forward flexion, she was able to reach eight inches from her toes. There was three/fourth's loss of extension and lateral bend to each side. The remainder of the examination was satisfactory. In reviewing x-rays of claimant's lumbar spine, he found minimal lumbar scoliosis and moderate demineralization diffusely. He did not remember that either the demineralization or scoliosis was present when he saw claimant previously.

Dr. Prostic opined that claimant had aggravated her preexisting low back disease and had developed some rotator cuff tendinitis of the shoulder as a result of the 2005 accident at work. He recommended claimant be treated with anti-inflammatory medicines, strengthening exercises for her back and shoulder, and intermittent heat or ice or massage to her low back.

As an exclusive result of her February 2005 work injury, Dr. Prostic rated claimant as having a 10 percent permanent partial impairment of the body as a whole for her lumbar spine and 10 percent permanent partial impairment to the left upper extremity for a combined impairment of 16 percent to the body as a whole. This impairment was over and above any previous impairment. Dr. Prostic increased claimant's impairment rating for her back over his first rating in 1998 because there had been an eight-year period between examinations and claimant had done well during that period. She had continued to work as a custodian during that period. Her range of motion had improved in 1998 and was significantly limited once again. Dr. Prostic believed she has worsened disk disease at L5-S1. In regard to her shoulder, Dr. Prostic did not feel she had significant difficulties before the 2005 accident. Her shoulder impairment is based upon weakness in the muscles innervated by the deltoid and suprascapular nerve and for the mild crepitus present.

Dr. Prostic was not aware that claimant had been involved in an automobile accident in December 2002 and had suffered a lumbar strain. He did not know that she had received treatment for those injuries from Dr. Egea. Dr. Prostic stated that if claimant saw Dr. Egea repeatedly and had four months of physical therapy, he would split his 10 percent rating and apportion half to the motor vehicle accident and half to the work injury. If, however, she was seen sporadically, had very little physical therapy, and recovered well, he would not deduct much from the 10 percent. He said it was possible that the injury in 2005 was a temporary aggravation of claimant's preexisting condition.

Claimant returned to Dr. Egea on November 20, 2006, for an evaluation in regard to the injuries she sustained at work on February 5, 2005. He reviewed claimant's medical records concerning her previous work-related accident in 1997, her automobile accident of 2002, and the medical records pertaining to her injury of February 5, 2005. After a

physical examination of claimant, Dr. Egea opined that she had reinjured her low back in the February 2005 accident. In his opinion, claimant had been doing well before the new injury but since then she has gotten progressively worse. Claimant now has difficulties in range of motion and a positive straight leg raising test that she did not have when he released her in April 2003. Dr. Egea said that claimant had mild pain and discomfort in the low back and mild spasm in April 2003, but her range of motion was good. When he saw claimant in November 2006, her pain was worse and involved more muscles higher in the spine. He believed there was a clear worsening of the part of the back than he had treated before and also a problem with the mid back that was new and not related to either the previous work injury or the automobile accident.

Based on claimant's range of motion in her shoulder, and using the AMA *Guides*, Dr. Egea rated claimant as having a 10 percent permanent partial impairment to the left upper extremity related to the February 2005 incident. He also rated her as having a 10 percent permanent partial impairment to her low back that was related to the February 2005 accident. These ratings were in addition to claimant's preexisting impairment.

A reading of claimant's testimony where she denied seeing Dr. Egea for low back complaints did not cause Dr. Egea to question the complaints she made during his physical examination of her because when he finds signs that correlate to complaints, he believes the patient.

## PRINCIPLES OF LAW

K.S.A. 510d(a) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . . .
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> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss

of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 44-510e(a) states in part:

> If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement . . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .
>
> The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

affliction.[9] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[10]

[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[10] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

K.S.A. 2006 Supp. 44-501 states in part:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.
>
> . . . .
>
> (c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

## ANALYSIS AND CONCLUSION

The ALJ determined that claimant's low back condition is the same now as it was before the accident of February 5, 2005. Her restrictions, symptoms and impairment have not changed. Claimant contends her low back symptoms were worsened by the accident at work and now include new areas of her back that were not previously symptomatic. Claimant's testimony of a worsening is supported by the expert medical opinions of Drs. Egea and Prostic but is contradicted by Dr. Wheeler and, indirectly, by Dr. Koch. Respondent agrees that claimant suffered injury to her low back on February 5, 2005, but contends her injury was a temporary aggravation of her preexisting condition. Furthermore, claimant's histories given to Drs. Wheeler and Prostic, and at the regular hearing, were incomplete and inaccurate. Her credibility is further challenged by the evidence of symptom magnification described by Dr. Wheeler. The preponderance of the credible evidence is that claimant's low back injuries of February 5, 2005, did not result in any additional permanent impairment of function that is ratable under the AMA *Guides*. The Board finds claimant has failed to prove she is entitled to an award of permanent partial disability compensation for her back.

Turning now to the left shoulder injury, the ALJ found claimant suffered a 10 percent impairment to that upper extremity and awarded permanent partial disability compensation based primarily upon the testimony of Dr. Prostic. Respondent points to the virtual absence of shoulder complaints in Dr. Wheeler's treatment records and the presence of preexisting shoulder complaints in the records of Dr. Egea and argues that claimant suffered no permanent injury or impairment to her shoulder.

Claimant suffered a traumatic injury on February 5, 2005, that resulted in injuries to her back, left shoulder and left hand. She sustained fractures to the index finger of her left

hand. Although she did not seek treatment for five days, she reported numerous symptoms, including the low and mid-back, hips, and buttocks. Little treatment was afforded to her shoulder and finger. Claimant did report neck, left shoulder, and arm pain to Dr. Wheeler at the initial appointment, but not at the subsequent visits. When claimant was examined by Dr. Prostic in October 2005, she reported intermittent mild symptoms in her left shoulder and left index finger, including clicking, popping and numbness in the finger. Dr. Prostic found crepitus, tenderness and weakness in the shoulder and diagnosed rotator cuff tendinitis. He rated claimant's shoulder impairment as 10 percent and attributed that impairment solely to the 2005 accident at work. Dr. Egea gave claimant the same 10 percent permanent partial impairment rating, which he likewise attributed to the February 5, 2005 accident. The Board finds claimant has met her burden of proof and finds claimant sustained a 10 percent permanent impairment of function to her left upper extremity at the level of the shoulder as a direct result of her work-related accident with respondent.

## ISSUE NO. 3

Is claimant entitled to an award for future medical treatment for either her left index finger, left shoulder or back?

### FINDINGS OF FACT

Dr. Wheeler believed that claimant would need to continue medication and use the TENS unit for the rest of her life. Dr. Prostic recommended she continue to be treated with anti-inflammatory medicines. He also recommended intermittent heat or ice, massage and therapeutic exercises for her back and similar medicine and strengthening exercises for her shoulder.

### PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2006 Supp. 44-510k(a) states:

> At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

In *Ferrell*,[11] the Court of Appeals stated:

> Claimant next challenges the ruling of the district court concerning the denial of future medical benefits. We cannot agree with the finding of the district court. The only evidence was the statement of Dr. Worth M. Gross who stated, "No further medication or treatment is indicated at this time." We cannot interpret that to mean that no future medical treatment is necessary or will in the future be necessary, only that future medical treatment does not now appear likely. Since K.S.A. 1974 Supp. 44-510 (now K.S.A. 1977 Supp. 44-510) requires the claimant to prove the reasonableness of any future medical expenses, no hardship is worked upon respondent. If respondent believes the expense is excessive or unnecessary, it may demonstrate that fact to the director and if it is correct the expense may be limited or disallowed.

## ANALYSIS AND CONCLUSION

Claimant contends she should be awarded future medical upon application to the Director for both her back and left shoulder. Respondent contends claimant has no permanent injury and therefore is not entitled to future medical. The Board has found claimant suffered permanent partial impairment to her left shoulder and, therefore, will award future medical treatment for that injury, as well as for the left index finger, upon application to the Director. The Board has determined that claimant's back injury is permanent but not rateable as an increased impairment under the AMA *Guides*. Dr. Wheeler recommended claimant continue using the TENS unit she prescribed, as well as anti-inflammatory medications. Therefore, claimant is also entitled to an award of ongoing and future medical treatment for the back.

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[11] *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423-24, 573 P.3d 1065 (1978).

## ISSUE NO. 4

Is claimant entitled to $200 in unauthorized medical expense for the cost of the examination by Dr. Egea?

### FINDINGS OF FACT

Claimant returned to Dr. Egea for an examination and diagnosis of her injuries. This examination was for both his recommendations for additional treatment as well as his causation opinion concerning what injuries were new versus preexisting and for rating purposes. Dr. Egea's report dated November 20, 2006, concerning his examination of claimant that same date did not include a rating or an opinion concerning claimant's percentage of permanent functional impairment under the AMA *Guides*. His bill for that examination and examination and report was $200. Dr. Egea was asked to and did provide a rating during his deposition testimony but presumably he billed separately for that service. There is no evidence that his $200 fee for his examination and report included his time for giving the deposition.

### PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-510h(b)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

In *Castro*,[12] the Kansas Court of Appeals stated:

> The Board concluded that Castro did obtain a functional impairment rating from Dr. Prostic, but the rating was not paid for by the $500 medical allowance provided by IBP. The functional impairment rating report was paid for by Castro almost 4 months later and almost 2 months after the administrative law judge appointed Dr. Harris to provide a rating. The Board also concluded that
>
> > "[a] claimant, if he or she so desires, may obtain a functional impairment rating from an examining physician and pay for such a rating separately. The claimant can then choose whether or not to

[12] *Castro v. IBP, Inc.*, 29 Kan. App. 2d 475, 477-78, 30 P.3d 1033 (2001).

> enter the functional impairment rating into the record and this would not violate the provisions of K.S.A. 44-510(c)(2)."
>
> The Board's interpretation of the statute is rational. If the statute was meant to be applied as IBP suggests, it would require the statute to contain additional language that would preclude the "results" of the exam from being subsequently used to obtain an impairment rating. IBP conceded the statute was "technically" complied with, but Castro violated the spirit of the statute. However, it is a legislative, not a judicial, function to rewrite the statute.

In *Carrizalas*,[13] the Board found:

> The Board also affirms the ALJ's award of unauthorized medical expenses for the purpose of examination, diagnosis or treatment up to the maximum of $500. But no portion of that amount may be used to pay for a functional impairment rating. In this case, Dr. Egea examined claimant on only one occasion but issued two reports. His June 5, 2000, Neurological Evaluation concerned diagnosis and treatment recommendations. Claimant may use his unauthorized medical allowance to pay for this examination. Dr. Egea was subsequently asked to provide a rating. Dr. Egea's fee for his July 24, 2000 letter to claimant's counsel was billed separately. Respondent is not required to pay for or reimburse claimant for the cost of this rating report and no portion of the unauthorized medical allowance is to be used for this purpose.

## ANALYSIS AND CONCLUSION

Claimant is entitled to payment of that portion of Dr. Egea's bill that was not for his rating opinion. This bifurcation of fees has become an accepted practice and has been approved by our appellate courts. The billing for the examination and the charge for the impairment rating were separate, consistent with the procedure approved in *Castro* and *Carrizalas*.

Respondent should pay for the cost of the examination of claimant by Dr. Egea as an unauthorized medical expense up to the statutory maximum.

## AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated April 3, 2007, is modified to order respondent to provide ongoing medical treatment for claimant's back injury and pay the unauthorized medical expense claimant incurred with Dr. Egea, but is otherwise affirmed.

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[13] *Carrizalas v. Winsteads Restaurants*, No. 251,072, 2002 WL 31950473 (WCAB Dec. 16, 2002), *aff'd* in unpublished Kansas Court of Appeals decision, No. 90,080, filed Jan. 23, 2004.

**IT IS SO ORDERED.**

Dated this _____ day of October, 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Christopher J. McCurdy, Attorney for Self-Insured Respondent
Robert H. Foerschler, Administrative Law Judge